

EVALUATION OF TEMPORARY CESSATION REGULATIONS AND RECOMMENDATION TO STRENGTHEN *Draft May 14, 2010*

Several Federal regulations have been identified for review and consideration, including possible rulemaking to improve program efficiency. OSM formed a team (the Team) to review the temporary cessation standards in 30 CFR 816/817.131. The Team included leader Jim Fulton, Josh Rockwell (Headquarters) Tom Koppe (Appalachian Region), Jeff Zingo (Mid-continent Region), and Glenn Waugh (Western Region).

In its initial conference call, the Team established an approach to its assignment. This included:

1. Establishing the goal with complete agreement of the Team,
2. Determining information and data necessary or helpful to achieve the goal,
3. Gathering and acquiring the information and data,
4. Reviewing and evaluating the information and data individually and as a team, and
5. Reaching consensus regarding the goal.

1. Establishing the Goal

The Team set a general goal to determine if the existing regulations should be changed. The combined experiences of team members pushed the goal to determine if the existing regulations should be strengthened. The Team further defined its task to consider whether the existing regulations allowed operations to be in temporary cessation without justification, whether it resulted in reclamation of mined land being unnecessarily delayed, and whether the length of time operations stayed in temporary cessation was an issue. Ultimately, the goal was to decide between recommending that temporary cessation regulations be strengthened and leaving the existing regulations unchanged.

2. Determining Information and Data Necessary or Helpful to Achieve the Goal

The Team decided to create a survey for each State and Federal regulatory authority. Before the survey was created, the Team listed known documents and reports related to temporary cessation. These included:

- Temporary cessation regulations in 30 CFR 816/817.131 and associated preamble
- Report on temporary cessation by the Appalachian Region in 2007
- Draft Policy to tighten control of temporary cessation by the Knoxville Field Office for the Tennessee Federal Program
- Administrative Law Judge decision in a case involving Pacific Coast Coal v. OSM
- Rule language contained in the 1991 Proposed Rule to strengthen control of temporary cessation
- Survey by the Team

Survey by the Team

The survey was designed to capture the use of temporary cessation by operators in the States and where OSM is the regulatory authority. This included the number of sites and the length of time those sites are in temporary cessation. In addition, the survey requested information about any problems States may have experienced and the steps taken to address temporary cessation. The survey included a table to be completed indicating the number of permits in temporary cessation and the length of time they have been in temporary cessation. The survey included the following 12 questions pertaining to the State's regulations and policies for temporary cessation. The survey was sent out the week of January 15, 2010.

Survey Questions (Temporary cessation is abbreviated as TC):

1. Is your TC regulation the same or similar to the Federal regulation at 30 CFR 816.131?
2. Is a notice of intent letter all that is required for TC?
3. Do you have an alternative regulation to 30 CFR 816.131? If yes provide a copy.
4. Do you prescribe an alternative to 30 CFR 816.131 by policy? If yes provide a copy.
5. Do you require an application and R.A. approval for TC? Who reviews the application? Who approves the application?
6. Does your process for TC require public notice?
7. Do you have time limits for TC? Explain, i.e. by permit term or otherwise.
8. Do you have the authority to terminate TC?
9. Do you have authority to require the operator to re-justify reasons for TC?
10. Are all types of Operations eligible for TC?
11. Can TC apply to a portion of a permit?
12. Describe the problems you may have experienced with TC and how you have addressed them.

3. Gathering and Acquiring the Information and Data

Regulations for temporary cessation are at 30 CFR 816.131 and 817.131. Because they are identical, we limit our discussion to 816.131. 30 CFR 816.131 and 817.131 states that:

(a) Each person who conducts surface mining activities shall effectively secure surface facilities in areas in which there are no current operations, but in which operations are to be resumed under an approved permit. Temporary abandonment shall not relieve a person of their obligation to comply with any provisions of the approved permit.

(b) Before temporary cessation of mining and reclamation operations for a period of thirty days or more, or as soon as it is known that a temporary cessation will extend beyond 30 days, persons who conduct surface mining activities shall submit to the regulatory authority a notice of intention to cease or abandon mining and reclamation operations. This notice shall include a statement of the exact number of acres which will have been affected in the permit area, prior to such temporary cessation, the extent and kind of reclamation of those areas which will have been accomplished, and identification of the backfilling, regrading, revegetation, environmental monitoring, and water treatment activities that will continue during the temporary cessation.

Appalachian Report

The Appalachian Region (AR) selected permits in temporary cessation mine status as a topic for regional consistency review in 2005. Permits throughout the AR that were in temporary cessation status were evaluated. The AR also held a workshop where State and OSM representatives discussed techniques for administering temporary cessation. The workshop and the study itself resulted in a significant reduction in the number of permits remaining in temporary cessation for an extended period of time. From the study the AR concluded that:

- All of the states have regulations deemed as effective as the corresponding federal regulations.
- All states except Maryland have written policies on temporary cessation.
- Maryland, Ohio, Pennsylvania, Virginia, and West Virginia have official temporary cessation application forms and a formal review and approval process.
- Overall, the inspectable units in temporary cessation were reduced from 2004 through 2007 by almost three percent in the AR.
- The majority of the permits in temporary cessation are underground mines.

Knoxville Report

In a draft proposal to tighten control of temporary cessation, the Knoxville Field Office stated the temporary cessation concept has been abused for years by operators desiring to retain viable permits but not conducting mining operations. There are several permits in Tennessee that have been idle for over ten years under the guise of temporary cessation. Several efforts have

been undertaken to force operators back into full operation or begin reclamation, but have failed for lack of a clearly defined regulations or policies.

ALJ Decision

OSM's Federal programs are subject to 30 CFR 816.131. The Western Region's Denver Field Division (DFD) administers the Federal Regulatory Program in the State of Washington. At its peak in the late 1990's, the John Henry Mine produced 300,000 tons of coal annually. With the loss of contracts, production ceased in year 2000. Since then, PCC (the Operator) maintained it was pursuing new contracts. In April of 2009, OSM ordered PCC to begin reclamation and PCC appealed to the IBLA. In October 2009, Administrative Law Judge Robert G. Holt affirmed the order and rejected PCC's defenses, holding that temporary cessation did not give PCC the right to indefinitely suspend reclamation, and while the order might prevent the recovery of the 500,000 tons of coal, the requirement to maximize the resource did not require that OSM allow an operator to recover all coal from a site.

1991 Notice – Proposed rule

The rule proposed in 1991 never went final. It was withdrawn October 16, 1992 (57 FR 47431) as a result of "reviews conducted under the President's Guidelines for Reducing the Burden of Government Regulations." The proposed rule would have required that before temporarily ceasing surface or underground coal mining operations for a period of more than 30 days under an approved permit, a permittee would first be required to submit an application to the regulatory authority for approval. The proposed rule would have established minimum information requirements for applications, criteria and a time limit for the regulatory authority's decision to approve or disapprove applications, pre-approval inspections to determine compliance with the regulatory program, and procedures for review of temporary cessation status at periodic intervals.

1991 Notice – Background and Explanation of Existing Rule

The Surface Mining Control and Reclamation Act of 1977 (the Act) establishes various requirements designed to protect the environment and the health and safety of the public from the adverse effects of surface coal mining operations and underground mining activities. To ensure these requirements would continue to be met during periods of inactivity when surface or underground coal mining and reclamation operations cease on a temporary basis, OSM promulgated rules at 30 CFR 816.131 for surface coal mining and reclamation operations, and at 30 CFR 817.131 for underground mining and reclamation activities. See 44 FR 15414 and 15441 (March 13, 1979). Both rules are substantially identical. They require an operator to advise the regulatory authority of his intentions to temporarily cease operations by submitting a brief closure plan and to eliminate safety hazards and assure continued environmental protection at the site.

The effect of temporarily ceasing a surface or underground coal mining and reclamation operation is that there will be a delay in the mining schedule specified under the approved permit and a corresponding delay in the reclamation of any open pits, spoil piles, roads, or

other disturbed areas that will be necessary to facilitate the resumption of mining activities. Consequently, the environment and the public are exposed to the effects of surface or underground mining for longer periods of time than originally planned and there will be a delay in achieving the postmining land use. Operations which are not in temporary cessation status are required by applicable Federal or State regulations to follow the mining schedules specified in the approved permits, and to reclaim mined areas contemporaneously with the active mining operations. Also, operations in temporary cessation status are eligible under 30 CFR 842.11 for a reduction in the number of minimum inspections required to be conducted by the regulatory authority each year. Inspections may be reduced from one complete inspection per calendar quarter and an average of one partial inspection per month required for active operations, to one complete inspection per calendar quarter.

In promulgating the existing rules, OSM recognized that temporary cessation of operations is relatively common and is sometimes necessary due to the nature of the coal mining business and the coal market itself. Moreover, section 515(b)(1) of the Act requires surface coal mining and reclamation operations to be conducted "so as to maximize the utilization and conservation of the solid fuel resource being recovered so that re-affecting the land in the future through surface coal mining may be minimized." Under this performance standard if an operator cannot comply with a mining and reclamation schedule for legitimate business reasons, it would make no sense to require the closing and reclamation of the uncompleted mining operation when closing would economically preclude future recovery of remaining coal reserves or would require substantial redisturbance of reclaimed land in order to reopen operations.

1991 Notice – Shortcomings of Existing Rule

In 1991, OSM's concerns with the existing rules centered on the absence of a formal process by which an operator must obtain regulatory authority approval of an application for temporary cessation based on relevant information, and on the absence of evaluative criteria guiding the decision to approve or disapprove an application. Under the existing rules, the operator need only submit to the regulatory authority a notice of intent that mining operations will cease for a period of more than twenty days. The notice of intent requires minimal information such as a statement of the exact number of acres that have been affected under the permit, the extent and type of reclamation that will have been accomplished on those areas, and identification of backfilling, regarding, revegetation, environmental monitoring and water treatment activities that will continue during the temporary cessation.

The more specific concerns arising from the lack of a formal application and approval process are presented below.

1. The existing rules do not require an operator to provide the reasons for proposed temporary cessation of operations so that the regulatory authority may evaluate the merits of those reasons. While OSM believes that it should avoid interfering with legitimate business decisions of coal operators to temporarily cease operations, it also believes that a regulatory authority must evaluate the merits of the reasons for a temporary cessation as necessary to ensure that postponement of reclamation which is incidental to temporary cessation of

operations does not occur for reasons which are unrelated to legitimate business needs and that each term proposed for temporary cessation of reclamation is commensurate with the particular business reasons and needs for cessation of operations. Although it may be impractical to identify every valid reason for temporarily ceasing operations beyond 30 days, OSM believes that regulatory authorities should be provided guidance at least in the form of examples of reasons it does consider valid.

2. The existing rules do not require an operator to submit information concerning the extent of the remaining coal reserves which will be recovered upon the resumption of mining, nor is the regulatory authority specifically required to determine if remaining reserves are sufficient to warrant temporary cessation. The entire concept of temporary cessation is predicated on the fact that mining and reclamation operations will resume and, therefore, economically viable coal reserves are necessary to gain or continue such status. To allow temporary cessation without a finding that economically viable coal reserves remain to be mined would amount to nothing more than a postponement of the requirement that mined land be reclaimed contemporaneous with mining.

3. While the existing rules provide that an operator in temporary cessation status must effectively secure surface facilities, there is no requirement for the operator to submit a plan addressing this requirement or a requirement for the regulatory authority to evaluate the effectiveness of the operator's methods. Since the protection of the public health and safety from hazards created by mining operations is one of the main purposes of the Act, OSM believes this aspect of temporary cessation deserves careful consideration.

4. The existing rules do not require a finding that an operator is in compliance with all requirements of the regulatory program and the approved permit before temporarily ceasing operations. Such a finding is particularly important with respect to contemporaneous reclamation.

5. The existing regulations do not require the regulatory authority to reevaluate the adequacy of the amount of bond filed with a permit before, or periodically during, temporary cessation. Without such a reevaluation it is possible that an operation could remain in temporary cessation status for several years during which time the value of the original bond may have substantially deflated to the point that it is no longer adequate to cover the cost of reclamation if it were to be performed by the regulatory authority in the event of bond forfeiture. Reevaluation of the bond both before temporary cessation begins, and periodically thereafter, is particularly important considering that many operators temporarily cease operations for financial reasons, the nature or extent of which is unknown to the regulatory authority.

6. The existing regulations do not provide for periodic review of those operation is temporary cessation status. The average term that an operation is in temporary cessation is 2.3 years, but can range up to five years or more. There currently is no assurance that once an operation enters temporary cessation status, it remains qualified for that status. Without some periodic review to validate the justification for continued temporary cessation, the potential exists for reclamation to be delayed indefinitely for reasons unrelated to legitimate business needs.

7. The existing rules do not specify under what conditions temporary cessation will terminate and thus, reinstate the operator's obligation to resume mining and reclamation operations to completion. The lack of such a provision could result in operations which intermittently resume mining for brief periods of time while delaying reclamation under the umbrella of temporary cessation status. Or, the lack of such a provision could allow temporary cessation status to continue even though a permit has expired due to the operator's failure to submit an application for permit renewal at least 120 days prior to expiration of the existing permit term in accordance with 30 CFR 774.15.

Results of the Survey

A chart of the survey results is attached.

Some States have promulgated regulations to strengthen their ability to administer temporary cessation.

Pennsylvania

Temporary cessation of an operation may not exceed 90 days unless the Department approves a longer period not to exceed 180 days or unless the Department approves a longer period for reasons of seasonal shutdown or labor strike.

New Mexico

New Mexico revised its definition of "temporary cessation of operations" to mean the cessation of mining or reclamation operations for more than thirty days and where a reasonable expectation of the continuation of mining can be demonstrated by the permittee;

New Mexico also added a time limit as follows:

No temporary cessation of mining and reclamation operations shall extend beyond the current permit term, unless the Director approves an extension of the temporary cessation during the permit renewal process conducted in accordance with 19.8.13 NMAC; (3) that to continue under a temporary cessation beyond an existing permit term, the permittee must demonstrate that the mining operation has a reasonable expectation of continuing operations; and (4) that a temporary cessation may not be used to justify a lengthy delay to final reclamation or to preserve facilities beyond what may be considered appropriate for their use in association with an existing permit

Iowa

Iowa amended its rule by adding a paragraph that reads:

The period of temporary cessation shall be a period of two years after which cessation will become permanent cessation and subject to (permanent cessation provisions). The applicant may request one 12 month extension of the two year time period. Approval of the extension shall be at the discretion of the Division administrator.

Ten States have clauses in their statutes precluding them from adopting provisions that are more stringent than the Federal regulations. These States have a temporary cessation provision that is the same as the Federal provision. These States cannot adopt provisions to strengthen their program until the Federal provision is changed.

OSM's Federal programs in Tennessee and Washington have experienced problems with the current regulation. They rely on the current Federal regulations.

Fourteen out of 24 States and the Federal regulators of the Washington, Tennessee and Indian programs cited they experienced problems administering temporary cessation. Most States believe there should be a maximum time limit.

The number of operations that have been in temporary cessation longer than five years is alarming.

OSM as the regulatory authority in Washington State has spent a significant effort just to terminate temporary cessation for a mine that has been idle for ten years.